IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 919 of 2003

For Approval and Signature:

HONOURABLE MR.JUSTICE ANIL R. DAVE
HONOURABLE MR.JUSTICE H.B.ANTANI

==========

1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

==========

ISLAMUDDIN NASARUDDIN SHAIKH - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

==========

Appearance :
MS REKHA H KAPADIA for Appellant(s) : 1,
MS HANSA PUNANI, APP for Opponent(s) : 1,

==========

CORAM : HONOURABLE MR.JUSTICE ANIL R. DAVE

and

HONOURABLE MR.JUSTICE H.B.ANTANI

Date : 02/11/2007

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE ANIL R. DAVE)

Being aggrieved by the judgment and order passed in Sessions Case No. 183/02 dated 2nd June, 2003 by the Addl. Sessions Judge, Court No. 9, Ahmedabad City, this appeal has been filed by the appellant-convict. By virtue of the impugned judgment, the appellant-convict has been held guilty of the offences punishable under sections 376 and 506(2) of the Indian Penal Code and has been sentenced to undergo Rigorous Imprisonment for 10 years for the offence punishable under sec. 376 of the IPC and a fine of Rs. 20,000/- and in default simple imprisonment for 1 year. For commission of offence under sec. 506(2) of the IPC, the convict has been sentenced to undergo Rigorous Imprisonment for 1 year and a fine of Rs. 2,000/- and in default simple imprisonment for 3 months. Both the sentences have been ordered to run concurrently.

2. The facts giving rise to the aforesaid Sessions Case, in a nutshell, are as under:

2.1 In view of the judgment delivered by the Hon'ble Supreme Court in the case of State of **Karnataka v. Puttaraja**, AIR 2003 SCW 6429, name of the victim has not been stated in this judgment, but she has been referred to as 'the victim.'

2.2 On 20th June, 2002 around 12 noon, when the victim was at the place of her in-laws, when her mother-in-law, sister-in-law and brother-in-law had gone out of the house for treatment of her sister-in-

law, and when her husband, Mohmed Islamudin Shaikh, had gone to Ajmer, her father-in-law – the appellant-convict – entered the house quietly and tied a dupatta on her mouth so as to prevent her from shouting; she was thrown on the floor and was then raped.

2.3 The victim was not permitted to leave the house for 3 days. When her husband returned from Ajmer, she revealed to him the fact with regard to commission of rape by her father-in-law, but to her dismay, her husband, Mohmed Islamudin Shaikh, did not believe her. Thereafter, mother-in-law of the victim also came to know about the incident but opted not to react. Because of the quarrel the victim had with other family members, she took a decision to go to her parents' house.

2.4 On 23rd January, 2002, the victim went to her parents' house and she confided all the facts to her parents. Father of the victim, Sahjadbhai Allanoor Saikh, PW No. 10 (Exh. 24) and other family members of the victim, after consulting senior members of their community, decided to file a complaint and, therefore, on 26.1.2002, an FIR (Exh. 5) was filed by the victim.

2.5 As the case was triable by the court of sessions, the case was committed to the sessions court under sec. 209 of the Criminal Procedure Code, by the Court of the Metropolitan Magistrate. Charge was framed on 1st January, 2003 against the convict (Exh. 1).

2.6 The convict was charged with commission of offences under the provisions of sections 376 and 506(2) of the Indian Penal Code. It was alleged that on 20.1.2002 between 11 a.m. and 12 noon the convict had raped the victim after tying a dupatta on her mouth and had given threats to the victim with dire consequences, if she revealed the said fact to anyone.

2.7 In the course of the trial the following main witnesses had been examined :

1. Daughter of Saijadbhai Shaikh, prosecutrix (victim), PW No. 1 (Exh. 4)
2. Sahjadbhai Allanoor Shaikh, father of the victim, PW No. 10 (Exh. 24)
3. Mundubibi Sahjadbhai Shaikh, Mother of victim, PW No. 12 (Exh. 20)
4. Dr. Mustakahmed Gulamrasul Shaikh, doctor who examined the victim, PW No. 3 (Exh. 11)
5. Desaibhai Mangalbhai Megha, I.O., PW No. 13, (Exh. 27)
6. Ranchodbhai Rupabhai Parmar, PW No. 14 (Exh. 35)

2.8 In addition to the aforesaid main witnesses, who were examined, the following documents had been looked into by the trial court during the course of the trial:

1. Complaint (Exh. 5)
2. Injury certificate (Exh. 12)
3. Despatch note of FSL (Exh. 30)
4. Letter of FSL (Exh. 31)
5. Covering letter (Exh. 32)
6. Opinion of FSL (Exh. 33)
7. Serological report (Exh. 34)
8. Panchnama of scene of offence (Exh. 28)

9. Panchnama of clothes of the victim (Exh. 7)

3. Learned advocate Ms. Rekha Kapadia appearing for the appellant-convict has vehemently argued that the Sessions Court has committed an error in appreciation of the evidence and has convicted the appellant though he is absolutely innocent. It has been submitted by her that looking to the facts of the case and upon proper appreciation of the evidence, the Sessions Court ought to have acquitted the accused.

4. She has mainly submitted that there was no allegation with regard to any such past incident or bad character of the convict and only with an oblique motive the allegation had been levelled so as to see that the husband of the victim stays separately from his family members with the victim at her parents' place.

5. The learned advocate has thereafter submitted that there was delay in filing the complaint and the said delay ought to have been held to be fatal to the case of the prosecution.

6. It has been further submitted that upon examination of the victim, the doctor did not find any external mark of injury and, therefore, the Sessions Court ought not to have believed the case of the prosecution.

7. It has been also submitted by her that clothes

of the victim had not been torn at all. Had there been a rape and force used by the convict, clothes of the victim would have been torn in normal circumstances.

8. It has been further submitted by her that the victim had ample opportunities to shout for help but the fact she had not shouted indicates that the incident had not taken place at all.

9. It has been further submitted by her that no independent witness has been examined and there being no eye witness, the Sessions Court should not have convicted the accused.

10. For the aforesaid reasons it has been submitted by her that the order of conviction deserves to be quashed and set aside and the appellant-convict should be set free.

11. The learned advocate has also relied upon the following three judgments to substantiate her case:

(1)Poladi Yakubkhan @ Nini Rahmetkhan v. State of Gujarat & Anr., 2007(1) GLH 427
(2)State of H.P. v. Gian Chand, (2001)6 SCC 71
(3)Dalip & Anr. v. State of M.P., 2001 Cri.L.J., 4721

12. On the other hand, learned APP Ms. Hansa Punani has submitted that it was not necessary for the prosecution to prove any fact relating to character

of the convict. Mere fact that the incident had taken place is sufficient for his conviction.

13. She has further submitted that delay of 6 days caused in filing the complaint has been properly explained. In any case, it cannot be said that there was unreasonable delay in filing the complaint.

14. With regard to submission of the learned advocate for the appellant about the medical evidence, it has been submitted by her that because of passage of time, medical evidence was not available, but that would not mean that the offence had not been committed by the convict.

15. It has been further submitted by her that simply because clothes of the victim had not been torn or she had not shouted for help, it would not mean that she was not raped. As mouth of the victim had been tied with a dupatta and she was thrown on the floor before being raped, the victim had no opportunity to resist and even if resisted, she could have been easily overpowered by the convict.

16. It has been further submitted by her that looking to the circumstances in which rape had been committed, there could not have been any independent witness and simply because there was no independent witness it would not mean that the convict had not committed the offence.

17. We have heard the learned advocates and have meticulously gone through the evidence adduced before

the Sessions Court. In our opinion, the prosecution had successfully made out a case against the convict and the Sessions Court is absolutely justified in holding the convict guilty of the offences alleged against him.

18. With regard to the first submission made by the learned advocate appearing for the appellant-convict, it may be noted that it is not necessary to have a finding with regard to bad character of a person, who commits an offence. Simply because in the past no such offence had been committed by the convict, it cannot be said that the convict father-in-law could not have raped the victim daughter-in-law.

19. With regard to the delay occurred in lodging the complaint, we have found that there are justifiable reasons for causing the delay. It is not that in every case, where delay has been caused in filing the complaint, the case of the prosecution becomes weak.

20. Looking to the peculiar facts of this case, in our opinion, though some delay had been caused in filing the complaint, it cannot be said that such delay would adversely affect the case of the prosecution or its merit.

21. The circumstances in which the delay had been caused have been duly explained by the prosecution. The incident had taken place on 20.1.2002 around 12 noon, when, except the victim and the convict, no one was there at the residence of the convict. As stated hereinabove, all other family members had gone out of

the house and at that time the convict had committed rape. It is pertinent to note that the victim, PW No. 1 (Exh. 4) has stated that after rape was committed, she was not permitted to go out of the house and practically she was locked in the house. Her husband, Mohmed Islamudin Shaikh, was also away in Ajmer and in his absence the victim had become more helpless and as she was not permitted to go out of the house, she could not contact anybody. The deposition of the victim in that regard sounds absolutely natural and therefore reliable. After having committed rape, the convict would not let the victim go out of the house so as to enable her to make complaint about the incident. All other family members were on the side of the convict and in such a set of circumstances, one can believe that the victim could not have even escaped from the residence of her in-laws.

22. On the third day from the date of commission of the offence, that is, on 23.1.2003, when the husband of the victim came back from Ajmer and when the victim confided to him the entire story, the husband did not believe her and therefore she became further helpless. It appears that thereafter some quarrel had taken place in the family and then the victim had left for her parental home.

23. The aforesaid version narrated by the victim sounds true and reliable. Even after going to her parental home, according to her evidence, it took some time for the family members to take a decision whether a complaint should be lodged against her

father-in-law. Here, one must not ignore the social milieu or set-up of the Indian society and the circumstances in which an individual, and particularly a woman, lives. The victim had two unmarried sisters. She also had other sisters, who were married. Filing of a police complaint could have brought problems in terms of social stigma for the family and possibly finding bridegrooms for her unmarried sisters would have become difficult. In such a set of social and family circumstances, one can believe that the family members could not have taken prompt decision with regard to filing a complaint. But, ultimately, after consulting other leading members of their community, it was decided to file a complaint and therefore the complaint was filed on 26.1.203. The delay caused in filing the complaint has been properly explained and the reasons given by the victim, PW No. 1 (Exh. 4) and her father, PW No. 10 (Exh. 24) and mother of the victim, PW No. 12 (Exh. 26) sound quite normal and convincing.

24. For the aforesaid reasons we are of the view that the delay caused in filing the complaint, which has been otherwise properly explained, cannot be said to be unusual and it should not adversely affect the case of the prosecution.

25. The submission with regard to lack of medical evidence would naturally follow in view of the fact that the complaint was filed after some time. No injury marks were found on the body of the victim. Even if there were minor injuries, the injuries could

have been healed during the period before the complaint was filed.

26. The submission with regard to the clothes being not torn also requires to be ignored. Possibly, the victim could not have resisted much and as she was thrown on the floor of the kitchen, her clothes could not have been torn. Had the surface of the place, where she had been thrown, been rough, possibly, the clothes could have been torn. Moreover, looking to the age of the victim and that of the convict, possibly, the victim must have been overpowered by the convict and because of the said fact, resistance by the victim would have been difficult.

27. Similarly, the submission that the victim did not shout for help is also of not much importance. It has been stated by the victim, PW No. 1 (Exh. 4) that the convict had tied her mouth with her dupatta and, therefore, it was not possible for the victim to shout for help and even if shouted, nobody would have heard it.

28. The submission of the learned advocate that no independent witness had been examined is also of no importance for the reason that as per the reliable version given by the victim, after entering the kitchen, the convict had locked the room/kitchen from inside and, therefore, it was not possible for any outsider to see the convict committing the offence. Had there been any other family member in the house, possibly, the offence would not have been committed by the convict father-in-law.

29. Upon having an overall view of the evidence, in our opinion, the learned Sessions Judge has rightly held the father-in-law guilty of the offences committed by him and therefore convicted him. It is really deplorable that the father-in-law, who was *in loco parentis* committed such a heinous offence and that too on his daughter-in-law, who ought to have been treated like a daughter.

30. Absence of evidence, other than the evidence given by the victim, would not mean that the offence had not been committed by the convict. If the evidence of the victim is convincing, even if there is no other corroborating evidence to support the case of the prosecution, as per law laid down by the Hon'ble Supreme Court in the case of **State of Punjab v. Gurmit Singh**, AIR 1996 SC 1393, the court can pass an order of conviction. It has been observed by the Hon'ble Supreme Court in the said case that *"Corroborative evidence is not an imperative component of judicial credence in every case of rape. Corroboration as a condition for judicial reliance on the testimony of prosecutrix is not a requirement of law but a guidance of prudence under given circumstances. It must not be overlooked that a woman or a girl subjected to sexual assault is not an accomplice to the crime but is a victim of another person's lust and it is improper and undesirable to test her evidence with a certain amount of suspicion, treating her as if she were an accomplice. Inferences have to be drawn from a given set of facts and circumstances with realistic diversity and not*

dead uniformity test that type of rigidity in the shape of rule of law is introduced through a new form of testimonial tyranny making justice a casualty. Courts cannot cling to a fossil formula and insist upon corroboration even if, taken as a whole, the case spoken of by the victim of sex crime strikes the judicial mind as probable."

31. Even in the case of **Gurmit Singh** (supra) with regard to delay, it has been observed by the Hon'ble Supreme Court that in sexual offence, the delay in lodging of the FIR can be due to several reasons and very often there is reluctance of the victim or her family members to go to the police and to complain about the incident, which concerns not only the reputation of the victim but also the honour of the family. In such a case, normally, the issue with regard to filing a complaint is considered with circumspection and at times it might result into some delay. The Hon'ble Supreme Court has observed that such delay would not matter if the delay has been properly explained.

32. In the instant case, the delay has been properly explained. It was not possible for the victim to leave the house of her husband as she was practically locked in the house and she could leave the house only after her husband came from Ajmer. In our opinion, the delay has been properly explained and looking to the facts of the case, it cannot be said that there was unreasonable delay in fling the complaint, which would raise any sort of suspicion.

33. In our opinion, the judgments cited to support the case of the appellant would also not render any help to the applicant. So far as the judgment delivered in **Poladi Yakubkhan @ Nini Rahmetkhan** (supra) is concerned, the said judgment would not help the appellant because the facts of the present case are absolutely different. In the judgment cited hereinabove, on facts, the version of the prosecutrix was not found to be reliable by the court. The Hon'ble Court has observed in the said case that the prosecutrix was not found to be a witness of sterling quality and there was conflict between the medical evidence and the version given by the prosecutrix. Looking to the said fact, in our opinion, the above-referred judgment would be of no help to the appellant as no such conflict exists in the instant case.

34. The judgment in the case of **State of H.P. v. Gian Chand** (supra) also would not render any help to the appellant. On the contrary, in our opinion, the said judgment would help the prosecution because in the instant case the delay has been properly explained and only on account of the delay, no medical evidence could be found.

35. So far as the judgment delivered in the case of **Dalip & Anr.** (supra) is concerned, the Court had found several contradictions in the story given by the prosecutrix. Because of the contradictions in the version given by the witnesses and the medical evidence, the prosecution could not establish its

case and, therefore, the accused was acquitted in the said case. In the instant case, there are no contradictions in the evidence adduced by the victim as well as her family members. Looking to the said fact and more particularly in view of the judgment delivered by the Hon'ble Supreme Court in the case of **Gurmit Singh** (supra), in our opinion, it cannot be said that the prosecution has not proved its case.

36. For the aforesaid reasons, in our opinion, the judgments cited by the learned advocate for the appellant would not help the appellant-convict.

37. For the aforesaid reasons, even in absence of medical evidence or an independent witness, the case against the convict has been successfully established by the prosecution and we see no reason to disturb the findings arrived at by the Sessions Court and, therefore, the conviction. The sentence imposed upon the convict is also found to be just and proper.

38. The appeal is, therefore, dismissed.

Muddamal articles to be disposed of in terms of the order passed by the trial court.

(Anil R. Dave, J.)

(H.B. Antani, J.)

(hn)